



## Not-for-Profit Law Notes

February 2015

### ACNC – A more secure future?

It no longer appears that the abolition of the Australian Charities and Not-for-profits Commission (ACNC) is imminent. The Minister for Social Services, Scott Morrison, was recently quoted in the media as saying the abolition of the charity regulator was a lesser priority. His admission comes after months of consultation between the Federal Government and charities and civil society organisations on the earlier released [Options Paper](#) and the proposed replacement arrangements for the ACNC. Although its axing is now less likely, it is still worthwhile for charities to familiarise themselves with the [Charities and Not-for-profits Consultation Report](#), which was released in December 2014 and provides a summary of consolidated feedback.

#### **New self-reporting requirements**

The Government's proposal that charities will be required to maintain a publicly accessible website that features relevant business information (such as the names of responsible persons, details of all Government funding and financial reports) was met with mixed reviews.

Respondents generally viewed reliance on websites and the loss of centralised reporting as inefficient and insecure. They also raised concerns that it might undermine the integrity and consistency of information provided to organisations and the public.

Similarly, respondents generally agreed that consistent and transparent reporting of activities and financial information would be most readily achieved through one free and publicly accessible register, which is already in existence. Respondents also highlighted various risks in publishing financial reports on organisations' websites, such as exposure of an organisation's growth strategy to its competitors.

The prospect of whether a website would reduce red tape divided respondents: some viewed the requirement to establish and maintain a website as overly burdensome, whilst others suggested that this was not the case because the majority of organisations already provide information on their websites.

#### **Determining charitable status**

The Options Paper proposed that responsibility for determining eligibility for charitable status will return to the Australian Tax Office under one of two different models.

The first model involves the establishment of an independent panel comprised of external experts who would provide advice on objections raised by charities that disagree with the initial ATO assessment on the determination of charitable status. This model was not however well received, as respondents noted that the panel would only have an advisory role and the three tiered appeal process would increase the red tape surrounding appeals.

The second model involves forming a separate area within the ATO that would be responsible for determining outcomes for applicants who disputed findings on their eligibility for charitable status and various tax concessions. Respondents agreed that this model did reduce the possibility of conflicting roles between assessing and subsequently reviewing charities, but highlighted that the separate area would not be independent if staffed by ATO members.

#### **Proportionate compliance framework**

Respondents noted that the decentralisation of powers in relation to information collection, monitoring and compliance to various regulatory

## ACNC – A more secure future? (Cont...)



bodies, including ASIC, ATO and State and Territory Governments, may lead to different interpretations and potential cross over in powers between regulatory bodies.

Furthermore, if directors' duties return to arrangements under the Corporations Act, respondents noted that not-for-profit directors (acting honestly with an appropriate degree of care and diligence) should be protected from the risk of personal liability so as not to discourage their involvement. This might take the form of a clause that gives directors the 'safe harbour' they need to devote their attention to the best interests of the charity.

### Transitional arrangements

The feedback on transitional arrangements highlighted the need for guidance on what form self-reporting will take, the need for lengthy implementation of the new arrangements (especially for smaller organisations) and the need for time allowances for organisations that have to change their constitutions and governance procedures.

### Next steps

The Report states that feedback received through the consultation process will influence the development of the replacement arrangements and drafting of new legislation. However, although these replacement arrangements were planned for introduction later this year, their implementation now seems highly unlikely. The Minister has identified the development of a families package as his first priority. He said that he has no immediate plans to progress any further on the issue of abolishing the ACNC. Even then, much opposition to the bill remains. For the time being, it seems the charity regulator will continue in its present role.

## Governance

Much is said about governance these days, particularly in relation to not-for-profit organisations. Is it all just theory (hot air)? We don't believe this. We see good governance as practical, make-a-difference practices. Would your organisation suffer if it had no board? We hope not but fear that, for many, the board's absence would not be noticed. How can your board improve its effectiveness? One way is to learn from others. The recently published [Leading with Intent: A National Index of Non-profit Board Practices](#) is well worth a look at in this regard.

A comprehensive survey of not-for-profit board practices, policies and performance in the US, *Leading with Intent* considers why not-for-profit leaders give their boards a "B minus" in overall performance and analyses what can be done about this.

Emil Ford Lawyers have for decades provided practical governance advice to not-for-profit leaders and boards operating across the spectrum: relief of poverty and disadvantage, education, media, museums and the arts, youth work, faith-based mission and more. Our lawyers are able to combine their legal expertise with



many years of experience serving on not-for-profit boards, often as the chair. If your board wants to be intentional about good governance, if the board really wants to adopt good governance practices so that it can make a positive difference, contact David Ford ([David.Ford@emilford.com.au](mailto:David.Ford@emilford.com.au)) or Fred Chilton ([Fred.Chilton@emilford.com.au](mailto:Fred.Chilton@emilford.com.au)) to see how we can help: perhaps some training for your board members or some one-on-one consultation with your chair.

## Beware of exploitive tax schemes

On 4 February 2015, the Federal Court handed down its decision to penalise a group of tax scheme promoters to the tune of \$1.5 million. The Court found that the promoters had attempted to exploit and profit from the tax system by generating deductions, associated with donation arrangements, to which donors were not entitled.

The scheme involved the purchasers paying a small percentage of the significantly inflated price of pharmaceuticals, yet claiming tax deductions of 100

per cent. The judge noted at least five grounds why the scheme was not lawful, including that the pharmaceuticals were not actually delivered to the charities concerned!

Follow this link [to read the Australian Tax Office media release](#) about the case.

Contact us ([lawyers@emilford.com.au](mailto:lawyers@emilford.com.au)) if you have questions about lawful deductions, or establishing and maintaining deductible gift recipient funds.

## NSW to implement Australia's first social impact investment policy

On 4th February 2015, NSW Premier Mike Baird and Treasurer Andrew Constance announced the launch of Australia's first Social Impact Investment Policy. This follows the successful launch of two social benefit bonds in 2013. The purpose of social impact investment is two-fold: to provide a measurable financial return, and to provide funding to effect positive social change.

This policy outlines ten actions that the NSW Government has committed to undertake:

1. Target delivering two new social impact investment transactions to market per year;
2. Publish Social Impact Investment Principles;
3. Publish benchmark cost and outcomes data;
4. Deliver a Social Impact Investment Statement of Opportunities;
5. Hold a series of social impact investment roundtables and market sounding sessions;
6. Aim to establish an Intergovernmental Taskforce on Social Impact Investment;
7. Promote understanding of the social impact investment market;

8. Improve government agency readiness for social impact investment;
9. Facilitate non-governmental sector preparedness for social impact investment;
10. Publish a Statement of Success.

To facilitate this undertaking, the NSW Government has established an Office of Social Impact Investment, a joint-initiative of the NSW Department of Premier and Cabinet and the NSW Treasury. In conjunction with the launch, the NSW Government also released a Statement of Opportunities, identifying growth areas for future social impact investments:

- Managing chronic health conditions;
- Supporting offenders on parole to reduce their levels of re-offending;
- Managing mental health hospitalisations; and
- Preventing or reducing homelessness among young people.

Although this initiative is still in the pioneering stage, it has the potential to become a significant source of funding for charities and not-for-profit organisations.

Contact Fred Chilton ([Fred.Chilton@emilford.com.au](mailto:Fred.Chilton@emilford.com.au)) to find out more about social impact investment.

## Unfair Dismissal at 65

Reaching the age of retirement is not fair grounds for dismissal. A recent decision of the Federal Court affirmed that the age of 65 constitutes a voluntary retirement age. Employees are entitled to work beyond this provided they are capable of performing their duties.

## Unfair Dismissal at 65 (Cont)

Over the course of several escalating communications, Mr Cheng was told that Company policy dictated that the business did not employ anyone who reached 65.

The Federal Court found that this statement did not reflect a substantive policy of the business and added that, in any event, such a policy would be discriminatory. Therefore, Mr Cheng was successful with his unfair dismissal application.

This is a helpful reminder that employers should not presume that their employees will voluntarily retire at 65, as they are entitled to work beyond this provided

they are capable of performing their duties.

Interestingly, the business and its directors also received substantial fines for failing to keep adequate records relating to employee leave entitlement and termination.

Contact David Ford ([David.Ford@emilford.com.au](mailto:David.Ford@emilford.com.au)) or Nathan Croot ([Nathan.Croot@emilford.com.au](mailto:Nathan.Croot@emilford.com.au)) for assistance with employment or discrimination issues.

### Advance Notice - Keep this date free!

#### Not-for-Profit Seminar: Legal Issues in the Not-for-Profit Sector

Date: Thursday 26 March 2015, 2pm-5.15pm

Venue: UNSW CBD campus, 1 O'Connell Street, Sydney

David Ford will be presenting on the topic of **Disputes, Allegations, Investigations: how do Not-for-Profit's cope?** His presentation will cover such issues as:

- Disputes with members and between members
- What do the rules say?
- Investigations and procedural fairness
- Mediation.

Follow this link for details on [how to register for Legal Issues in the Not-for-Profit Sector seminar](#).



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